SOME LEGAL ASPECTS OF SPECIAL ASSESSMENTS*

TAXES have been defined as "the enforced proportional contributions from persons and property levied by the state by virtue of its sovereignty for the support of the government and all public needs."

The essential elements that we will notice particularly are two; first, that the contributions are proportional, that is, levied upon all in the same class according to some impartial standard, and second, that taxes can be levied for public purposes only.

The tax is justified by the protection to person and property and the many advantages which the government affords its citizens in return for their support.

The legislature decides how the tax shall be apportioned and what purpose is such a public purpose as to support the validity of the tax. But while every doubt is resolved in favor of the legislative determination that a certain purpose is a public purpose this determination is not conclusive, and the courts sometimes declare a tax law void because the purpose was not public. This is well illustrated by a recent case in this state. The legislature had passed an act providing for the encouragement of the manufacture of beet sugar and declaring a bounty of one cent a pound on all sugar made under certain conditions. This bounty was to be paid by a tax, but the supreme court held the law unconstitutional and void as being an attempt to raise money for a private purpose by taxation or in other words, to take the money of A without his consent and give it to B.[1]

While taxation is a legislative function it does not follow that congress or the state legislatures levy all the taxes. For in this country the right of the local government to vote the local taxes is generally recognized. Judge COOLEY says:—

"If any state has the power to withhold it the exercise of such a power would be justly regarded as tyranny. Indeed local taxation is so inseparable an incident to republican institutions that to abolish it would be nothing short of a revolution."

Generally, then, the state legislature levies the state taxes, the local legislature, board of supervisors, common council or whatever it may be, levies the local taxes.

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[1] Michigan Sugar Co. *v.* Auditor-General, 124 Mich. 674.

And while it may well be doubted that the legislature has power to refuse to grant to the local bodies the right to tax, it will not be doubted that they must show that the legislature or the constitution has in fact clothed them with the right.

It is also recognized as fundamental in taxation that the tax shall be expended in the district where it is raised. For clearly that could not be called a tax law which would require a single county to defray the expenses of the state or a single ward to contribute the entire revenue required by a city government.

Taxes, then, are levied by the representatives of the people who are to pay them, and are expended for the public purposes of the government which levied them, for example, city taxes are levied by the common council, paid by the taxpayers in the city, and spent in theory at least, in maintaining the city government.

That taxes are absolutely necessary and that the taxpayer receives a benefit from their payment no one will deny. But this benefit may not be immediate, and it may not be possible for the taxpayer to see that the value of his property has been increased to the extent of the sum paid or in any amount. Nor is it necessary that he should, for his tax is rather the price he pays for the priceless advantages of organized society.

But it is conceded that taxes may be required for other purposes than the support of government, as the paving of a street or the construction of a sidewalk, and then the question arises whether this expense should be borne by a general tax or wholly or in part by a special tax on the real estate in the locality. The street and sidewalk are improvements which benefit all, but not in the same degree. The property near, and certainly that abutting upon the improvement, receives a special benefit which increases the value of the property in a direct way and to an amount which can be estimated. It seems only just to all that the property thus specially benefited should contribute, in excess of the sum exacted from property not so situated, an amount equal to this increase in value, and if the increased value of the adjacent property equals the entire cost of the improvement it may properly be required to bear the whole expense, for as one court concisely puts it:—

"While the few ought not to be taxed for the benefit of the whole, the whole ought not to be taxed for the benefit of the few . . . General taxation for a mere local purpose is unjust; it burdens those who are not benefited and benefits those who are exempt from the burden."[1]

[1] Lockwood *v.* St Louis 24 Mo. 20.

This is the theory which justifies taxation by special assessment, whatever form it may assume, for whatever purpose it may be used, and however anomalous may be the results. That this is in no strict sense a tax is apparent. It is rather a compulsory payment for an increment to the estate, and is commonly spoken of as a local assessment, a special assessment or an assessment for special benefits. It is not usually included in the word "tax" in the law so property "exempt from taxation" is not exempt from a special assessment for a local improvement.[1] And property of a cemetery association which is by statute exempt from "any tax or public imposition whatever" is liable for a paving tax.[2]

Nor does the provision in a railroad charter that "this corporation is hereby exempted from all taxation of every kind" or that a specific tax shall be paid "in lieu of all other taxes" prevent the levy of a special assessment.[3]

Many of the state constitutions require that "taxation shall be equal and uniform" or that "taxes shall be levied upon all property according to its value" but the courts have held quite generally that these provisions do not prohibit special assessments according to benefits, or to area, or frontage, or some standard other than value.

The distinction between a local assessment and a general tax is thus summarized by a Mississippi judge:

"A local assessment can only be levied on land, it cannot, as a tax can, be made a personal liability of the taxpayer; it is an assessment on the thing supposed to be benefited. A tax is levied upon the whole state or a known political subdivision as a county or a town. A local assessment is levied upon property situated in a district created for the express purpose of the levy and possessing no other function or even existence than to be the thing upon which the levy is made. A tax is a continuing burden and must be collected at short intervals for all time and without it government cannot exist; a local assessment is exceptional both as to time and locality, it is brought into being for a particular occasion and to accomplish a particular purpose and dies with the passing of the occasion and the accomplishment of the purpose. A tax is levied, collected, and administered by a public agency, elected by and responsible to the community upon which it is imposed; a local assessment is made by an authority *ab extra*. Yet it is *like* a tax in that it is imposed under an authority derived from the legislature, and is an enforced contribution to the

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[1] Lefevre *v.* Detroit, 2 Mich. 586.

[2] Baltimore *v.* Green 7 Md. 517; Buffalo Cemetery Association *v.* Buffalo, 46 N. Y. 503.

[3] Ill. Cent. R. Co. *v.* Decatur 126 Ill. 92; D., G. H. & M. R. Co. *v.* Grand Rapids, 106 Mich. 113.

public welfare, and its payment may be enforced by the summary method allowed for the collection of taxes. It is *like* a tax in that it must be levied for a public purpose and must be apportioned by some reasonable rule among those upon whose property it is levied. It is *unlike* a tax in that the proceeds of the assessment must be expended in an improvement from which a benefit clearly exceptive and plainly perceived must inure to the property upon which it is imposed."[1]

Of this Judge Cooley aptly remarks "not all of these differences are necessarily existent in every case but in the main the characterization is accurate as it is forcible."[2]

The legislature determines the purposes for which a special assessment may be employed, and it may also determine the property benefited and the methods to be used in apportioning the cost of the improvement between the public and property specially benefited, and also among the different parcels of the property so benefited. And it may do this, in the absence of constitutional restraint, not only for a special case but by a general rule applicable to all cases. That is, it may provide that the whole or any part of the cost shall be borne by the property determined by the legislature to be specially benefited, and that this property shall be assessed according to some definite standard as frontage, or area, or it may be according to value or the benefits, found by the investigation of some authorized agency, to accrue to each parcel of property. Or it may delegate to some local body, usually the local legislative body, the power to establish the limits which shall include the property so benefited, and to apportion the cost between the district and the public, and also to choose the method of making the assessment.

But some only of these matters may be left to the discretion of the local officers, and they may be required in those things not within their discretion to follow the rules which the legislature has established. Many courts have held that this legislative determination upon some, if not all of these questions, is conclusive, as it is presumed to represent the judgment of the legislature that the property assessed bears only its just burden and not in excess of the benefit received.

But that there are limitations upon the power of the legislature both as to the purpose for which an assessment may be employed, and in the method of levying and enforcing it, would seem clear in principle, and is not unsupported by authority.

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[1] George, C. J. in Macon *v.* Patty, 57 Miss. 378.

[2] Cooley on Taxation, 607.

And to a brief examination of these limitations we now turn.

It has already been seen that the purpose must be public, and the improvement local to justify the levy of a special assessment. But what is a local improvement? Sidewalks, pavements, and sewers, are everywhere so regarded. But the list is not finally made up. May street sprinkling be paid for by a special assessment according to frontage under a constitutional provision permitting it for "local improvements"? The Minnesota Supreme Court answers the question in the affirmative, though it was strongly urged that it was not durable nor permanent enough to be called an improvement. The court says:—

"The only essential elements of a local improvement are those which the term itself implies, viz., that it shall benefit the property on which it is assessed, in a manner local in its nature and not enjoyed by the city generally."[1]

A similar law was reluctantly upheld by the Supreme Court of Massachusetts, which says:—

"It is a grave question whether the benefit which comes to abutting property from the watering of the street in front of it is such an improvement that it can be made the subject of a special assessment upon it. There must be a real substantial enhancement of value growing out of a public work to warrant an assessment of special taxes upon particular estates on account of it. . . . With some hesitation we hold that there is an improvement of private property when this work is done regularly from day to day by a city which may warrant an assessment upon abutters." The court added "That an assessment in substantial excess of the benefit would be invalid."[2]

But the Supreme Court of Illinois held void an assessment for such a purpose, which was levied under a charter empowering the city to "lay out, open, alter, widen, grade, pave, and otherwise improve" its streets. The court said:—

"It is, however, insisted that the sprinkling of the streets during the summer months renders the occupation of adjacent property more enjoyable and comfortable, and that therefore the property is enhanced in value. Doubtless the same result would follow by placing vases at convenient points in the street to be filled each morning with fresh-cut flowers, or by open air concerts, in which music should be selected with special reference to the taste of the adjacent dwellers "[3]

And in *New York Life Ins. Co.* v. *Prest*,[4] a federal judge reaches the same conclusion. "It is," he says, "as evanescent as the

[1] State *v.* Reiss, 38 Minn. 371.

[2] Sears *v.* Boston, 173 Mass. 71,

[3] Chicago *v.* Blair, 149 Ill. 310.

[4] 7 Fed. Rep. 815.

early and the latter dew, and in my judgment it is no more within the power of the municipality thus to create liens on the citizen's property than to hire a rainmaker to vex the skies for refreshing showers and to charge the lots adjacent to the raindrops with the cost thereof." And a charter provision expressly authorizing a special assessment for street sprinkling was held void.

The Supreme Court of Missouri states what would seem to be the correct principle in these words: "Private property cannot be taken for public use without just compensation. Special benefits cannot form any part of such compensation unless they attach to and become a part of the taxed property."[1]

What would be a local improvement which would cause an increase of value to real estate held for one purpose, might not be such if the land were used for other purposes. So the courts are not agreed as to the legality of such assessments against a railroad for paving a street along or across its right of way. And when the railroad owns only an easement, it would seem in principle *impossible* to sustain it. And independently of the ownership of the fee, it was held in a case in this state, under a charter requiring such assessments to be made according to benefits, that a special assessment against a railroad for opening and improving a street across its right of way, two blocks from any of its buildings could not be sustained.[2] And there are numerous decisions of similar import. However, their stations, termini, and other lands, may be so charged, though of course they cannot be sold in order to collect the tax.[3]

And usually the fact that the improvement does not enhance the value of the land while its present use is continued, does not prevent this method of taxation, for there is nothing necessarily permanent in any particular use. So property held for educational, charitable, and even burial purposes, may be so assessed, though their present use is not rendered more valuable.

Is the legislature also limited in its methods? In *Thomas* v. *Gains*,[4] Judge COOLEY said:—

"But it is generally agreed that an assessment levied without regard to actual benefits is unlawful, as constituting an attempt to appropriate private property to public uses. . . . It is admitted that the legislature

[1] State *v.* Leffingwell, 54 Mo. 458.

[2] D., G. H. & M. R. Co. *v.* Grand Rapids, 106 Mich. 13.

[3] L. S. & M. S. Ry. Co. *v.* Grand Rapids, 102 Mich. 374.

[4] 35 Mich. 155.

may prescribe the rule, but it is not conceded that its power in this regard is unlimited. The rule must be one which it is legally possible may be just and equal among the parties assessed."

And in a late Michigan case an act, which provided that not less than one half the cost of opening a street should be levied upon the district previously determined to be specially benefited, was held to be unconstitutional. GRANT, J., says:—

"The jury are required to assess one half upon the assessment district regardless of whether it is benefited to this extent. The legislature has no power to fix an arbitrary percentage of a public improvement to be imposed upon a local assessment district regardless of the benefits received."[1]

But even now most of the states are committed, to a much greater extent than Michigan, to the doctrine of the conclusiveness of the legislative determination. And in *some* forms of public work, as street paving, it is quite generally admitted that a definite part, or all of the expense, may be imposed upon the abutting property by the frontage rule. In *Shely* v. *Detroit*,[2] Judge COOLEY, who had so recently emphatically asserted that the legislative power was not without its bounds, sustained a special assessment by the frontage rule to pay for a street improvement. He said:—

"We might fill pages with the names of cases decided in other states which have sustained assessments for improving streets though the apportionment of the cost was made on the same basis as the one before us. If anything can be regarded as settled in municipal law in this country, the power of the legislature to permit such assessment and to direct an apportionment of the cost by frontage should by this time be considered as no longer open to controversy. Writers on constitutional law, on municipal law, and on the law of taxation, have collected the cases and recognize the principle as settled."

That a rule so firmly established, though seeming to be arbitrary, must possess much merit, is clear, and where the cost of the improvement does not exceed the benefit, and the taxed property is used for similar purposes, is similarly situated, and the parcels are the same shape, it is doubtless the best rule that could be devised. It is to be preferred, in such cases, even to an assessment against each lot of the actual benefits, for under this rule, ideal in theory, there is always room for honest error, partiality, prejudice, or even corruption. But peculiar cases sometimes arise.

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[1] Detroit *v.* Judge of Recorder's Court, 112 Mich. 588. See also Seeley *v.* Pittsburg, 82 Pa. St. 360; McFarlane *v.* Chicago, 185 Ill. 242; and this is the tendency of the later decisions.

[2] 45 Mich. 431.

In *Atlanta* v. *Hanlien*,[1] the city of Atlanta had assessed a paving tax of $725 against Hanlien by the front foot rule on a strip lying 400 feet on the street, seven feet wide at one end and three feet wide at the other. The adjoining property was platted into lots fronting other streets. The highest estimate of the value of the strip after the improvements was $260, and it was agreed that its value had not been increased by the improvement. The tax was enjoined. The court said:—

"As a general proposition upon the question of benefit, whether general or special, the owner is concluded by an expression of the legislative will . . but . . . it is not allowable that the municipal authorities, under the guise of a public improvement, should arbitrarily deprive the citizen of his estate. . . . This assessment if upheld as legal would appropriate to the public use entirely the property subject to the assessment and in addition leave the owner in debt to the city in the sum of $460. . . . The exact extent of benefit necessary to uphold such an assessment is incapable of definition. But it may be asserted with perfect confidence that the present is one of those extreme cases of such doubtful benefit and probable spoliation as will justify the interference of a court of equity."

But where, after a contract is made for a street improvement but before the lien has attached, the owner of abutting property sells a strip on the street two feet in width for the purpose of evading the tax, to one who knows the facts and is paid to accept the deed, the transaction has no effect as against the assessment.[2]

In Pennsylvania the cost of the first pavement may be assessed against the abutting property, but repaving must be paid for by a general tax.[3]

Can the assessment exceed the value of the land? The courts do not agree in their answer. That this result is not desired and that it is in direct contravention of the theory of special assessment must be admitted. But it seems that in practice this may happen in compliance with laws that are valid. Yet under such circumstances the owner of the lot should be entitled to relief; and so are some cases.[4]

If the tax can exceed the value of the land it is certainly more than the benefits, and if the tax is made merely a lien on the land the owner loses his property. But in some states a personal judg-

[1] 101 Ga. 697.

[2] Eagle Mfg. Co. *v.* Davenport, 101 Ia. 493; Stifel *v.* Brown, 24 Mo. App. 102.

[3] Williamsport *v.* Beck, 128 Pa. St. 147.

[4] Zoeller *v.* Kellogg, 4 Mo. App. 163; Preston *v.* Rudd, 84 Ky. 151; Atlanta *v.* Hanlien, 101 Ga. 697.

ment against the owner is provided for so that he may not only lose his land, but be obliged to pay a further sum, and all in discharge of a special assessment whose only justification is that the property has been enhanced in value in a sum at least equal to the tax. In Missouri, California, Illinois, Kentucky, Oregon and Washington, such judgments are declared unconstitutional, but several states have upheld them and in others they appear to have passed unchallenged. The complaining taxpayer is concluded by the decision of the courts of his state for the Supreme Court of the United States has held that a personal judgment for a special assessment was due process of law, and raised no federal question under the 14th Amendment.[1] But of course a state has no power to render a personal judgment against a non-resident even though he resorts to the state courts for relief.[2] The tax lien may be given precedence over existing liens.[3]

In Wisconsin, Iowa and Oregon, the abutting property may be assessed for the cost of improving the part of the street immediately in front of it. This method ignores one of the essential elements of taxation, namely, apportionment, and as has been suggested might, through accidental circumstances impose upon a single lot a large part of the expense of the entire work. For these reasons it has been held invalid in Washington and in this state.[4]

In several states this method has been sustained in the case of sidewalks as an exercise of the police power,[5] and in others it appears to have been sustained even under the power of taxation.[6]

The Supreme Court of Oregon in sustaining such an assessment, said that there was such a broad latitude to legislative action that a rule prescribed should be given effect unless it results "in imposing a burden in substantial excess of the benefits or disproportionate as among the owners." . . "Neither ought the system to be condemned because there may be exceptions wherein it would work a legal injury. If such an exception arises the court will not enforce it, but will hesitate long to condemn a rule because of the exception."[7] In affirming this case the Federal Supreme Court says:—

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[1] Davidson *v* New Orleans, 96 U. S. 97,

[2] Dewey *v.* Des Moines, 173 U. S. 193.

[3] Morley *v.* Duluth, 75 Minn 221; Providence Institution *v.* Jersey City, 113 U. S. 506.

[4] Seattle *v.* Gesler, 1 Wash. 571; Motz *v.* Detroit, 18 Mich. 494.

[5] Palmer *v.* Way, 6 Colo. 106.

[6] Greensburg *v*, Young, 53 Pa. St. 280; Sands *v.* Richmond, 31 Gratt. 571; Washington *v.* Marshall, 1 Swan (Tenn.), 177.

[7] King *v.* Portland. 38 Or. 402.

"But if accidental circumstances take from the rule the effect of the apportionment, they do not prevent the application of the rule to cases where such circumstances do not exist. Where they exist they can be properly dealt with."[1]

Whether the taxpayer is entitled to notice and a hearing, and, if so, to what kind of a hearing, before the tax becomes a charge against him or his property is a question of very great importance. That he is not entitled to a hearing in court unless the statute so provides is conclusively established. The time of the hearing and its scope would seem to depend to some extent upon the method adopted for the assessment. In *Spencer* v. *Merchant*,[2] the court says:—

"When the determination of the lands to be benefited is entrusted to commissioners the owners may be entitled to notice and a hearing as to whether the lands are benefited and how much. (This much is dictum.) But the legislature has the power to determine by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited, and if it does so its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited.".

And in *Paulsen* v. *Portland*,[3] it was said:—

"It is settled that if provision is made for notice to and hearing of each proprietor at some stage of the proceedings upon the question of what proportion of the tax shall be *upon his land*, there is no taking of his property without due process of law."

It is true, I believe, that a large majority of the courts would not hold that the taxpayer was entitled to a hearing of this latter character, but that such a hearing as is suggested in the preceding case was sufficient.

If the district to be benefited and also the sum to be charged thereon is left to the judgment of commissioners and such sum is to be apportioned among the property owners according to benefits the property owners are entitled to be heard on the latter matter only and upon the validity of the assessment.[4]

From what has been said it follows logically that when the legislature determines the property benefited and adopts a definite

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[1] King *v.* Portland, 184 U. S. 60.

[2] 125 U. S. 345.

[3] 149 U. S. 30.

[4] Voigt *v.* Detroit, 123 Mich. 547 affirmed 184 U. S, 115; Goodrich *v.* Detroit, 123 Mich. 559 affirmed 184 U. S. 432.

method of apportionment as that the whole or some specified part of the cost shall be levied upon the property according to frontage or area no notice or hearing is required. Or at most it is only necessary that the taxpayer be allowed to show that there had been some mistake in the simple arithmetical calculations or that the assessment was not in compliance with the law, and to this he would seem to be entitled as of right. And so are most of the authorities.

Under these conditions the taxpayer feeling himself abused and burdened with a tax in excess of the benefits and having had no opportunity to establish his claims goes to the court only to be told that he really isn't damaged, that his tax really isn't more than the increase in the value of his property because the legislature has so declared. And even if his tax is greatly in excess of the benefits received the courts can give him no relief. It is not strange that the taxpayer surprised rather than satisfied, turns to the federal courts to see if he can not avail himself of the protection of that latest and greatest magna charta, the 14th Amendment to the Constitution of the United States.

In 1898 the case of the *Village of Norwood* v. *Baker*,[1a] came before the Supreme Court of the United States from the Circuit Court for the southern district of Ohio. The facts were briefly these: Two streets, or different portions of the same street, extended in opposite directions from the opposite sides of Mrs. Baker's land and to connect them a strip of this land three hundred feet long and fifty feet wide was condemned and $2000 was paid to Mrs. Baker as compensation as the Constitution of Ohio did not allow this sum to be reduced by benefits. The village then assessed against her abutting property this entire sum together with the cost of condemnation and opening and this was done without any inquiry as to the actual benefits, but under the frontage rule and in careful compliance with the statutes of Ohio in such cases made and provided.

Mr. Justice HARLAN delivered the opinion of the court. After stating the principles underlying special assessment, he says:—

"But the guarantees for the protection of private property would be seriously impaired if it were to be established, as a principle of constitutional law, that the imposition by the legislature, upon particular private property of the entire cost of a public improvement, irrespective of any particular benefits accruing to the owner could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe, as a general rule,

[1a] 172 U. S. 269.

that property abutting upon a street opened by the public, shall be deemed to be benefited by such improvement, and therefore should specially contribute to the cost. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, without any right in the property owner to show when an assessment of that kind is made or is about to be made, that the sum, as fixed, is in excess of the benefits received. In our judgment the exaction from the owners of private property, of the cost of a public improvement, in substantial excess of the special benefits accruing to him, is to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say substantial excess because exact equality of taxation is not always attainable, and for that reason, the excess of costs over benefits, unless, it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment. . . . . .

"It will not escape observation that, if the entire cost incurred by a municipality in condemning land for the purposes of opening or extending a street, can be assessed back upon the abutting property without inquiry in any form as to special benefits received by the owner, the result will be more injurious to the owner than if he had been required, in the first instance, to open the street at his own cost without compensation in respect to the land taken for the street, for he might thus save at least the cost of the formal proceedings of condemnation. . . . . .

"The assessment was by the front foot, and for a specific sum representing the entire cost, and such sum could not have been reduced even if proof had been made that the costs and expenses assessed upon the abutting property exceeded the benefits. The assessment itself was illegal because it *rested upon a basis* that excluded any consideration of benefits. . . . The present case is one of illegal assessment under a *rule or system*, which, as we have said, violated the constitution in that the entire cost of the improvement was imposed upon the abutting property by the front foot without any reference to special benefits."

The judgment of the Circuit Court was affirmed upon the ground:—

"That the assessment upon plaintiff's abutting property was under a rule which excluded any inquiry as to special benefits and the necessary operation of which was, to the extent of the excess of the cost over any special benefits accruing to the property, to take private property for public use without compensation."

I have quoted thus *in extenso* in order that the point determined may clearly appear, namely, that an assessment by the front foot rule without an actual determination of benefits could not be sustained. And this conclusion was reached in a case where the complainant did not allege that the tax exceeded the benefits. As the dissenting opinion says this is in effect to hold that such a method of assessment was not even prima facie valid. From this opinion BREWER, GRAY, and SHIRAS JJ., dissented. This opinion was

received by the state courts with little less than consternation as it seemed to most of them, and we fail to understand why it did not seem to all, to overthrow the method which had become thoroughly entrenched in the systems of the states.

For those who insisted upon a case on "all fours" there was an opportunity to differentiate and of this advantage was quickly taken. This case was one of condemnation as well as of taxation and possibly the Supreme Court did not mean what it said and would reach a different conclusion in a case involving taxation only. And cases soon reached the court from the Supreme Courts of Missouri, North Dakota, Michigan and Illinois, in which those courts had declined to follow *Norwood* v. *Baker*.

Other cases came from the Court of Appeals of the District of Columbia and the Circuit Courts of the United States for the eastern district of Michigan and the northern district of New York which had applied *Norwood* v. *Baker*. In a number of states the decisions had been in accordance with the principal case so of course there was no opportunity for appeal.

Of the cases so brought to the federal supreme court the one in which the fullest opinion appears is *French* v. *Barber Asphalt Paving Co.* from the Supreme Court of Missouri and involving the validity of a tax lien for a special assessment by the front foot rule for street paving. Here as in the *Norwood-Baker* case there was careful compliance with the statutes and no claim that the tax was in excess of benefits. Neither did it appear that the property was peculiarly situated or that its burden was unequal. In other words we have here the exact situation of the former case, except the condemnation feature, and the peculiar results of that case, which it would seem, should be regarded as mere incidents in the operation of a general rule. No personal judgment was authorized and the right was expressly conferred upon the property owner to reduce the assessment by showing that the amount was erroneously computed or that the work was not well done.

This, however, falls far short of permitting the one taxed to show that the assessment exceeded the benefits, SHIRAS, J., who dissented from the opinion in the former case delivered the opinion of the court. He calls attention to the extent to which this method has been adopted and says of *Norwood* v. *Baker*:—

"That was a case where, by village ordinance apparently aimed at a single person, a portion of whose property was condemned for a street, the entire cost of opening the street, including not only the full amount paid for the strip

condemned, but also the costs and expenses of the condemnation proceedings, were thrown upon the abutting property of the person whose land was condemned. This appeared, both to the court below and to a majority of the judges in this court, to be an abuse of the law, an act of confiscation, and not a valid exercise of the taxing power."

With the utmost deference to the distinguished jurist we confess ourselves unable to understand how it can be said that a village ordinance is "apparently aimed at a single individual" when it is passed in strict conformity to general legislative authority. Nor can we comprehend how the result could be called "an act of confiscation" when there is absolutely nothing in the record to show that the sum Mrs. Baker was called upon to pay even equalled the benefits she received.

And, further, the judgment in that case was repeatedly said to rest upon the fact that a *rule* or a system had been employed which was erroneous and void because it precluded an inquiry into the benefits received.

Justice SHIRAS continues:—

"It may be conceded that courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of life, liberty or property without due process of law and such, in the opinion of a majority of the judges of this court, was the nature and the effect of the proceedings in that case."

The opinion of the Supreme Court sustaining the assessment was affirmed.

As would be expected Justice HARLAN wrote a vigorous dissenting opinion in which Justices WHITE and MCKENNA concurred, insisting that the former proceedings had failed because of the *rule* and not merely on account of the results. And it is certain these results might follow in cases where there had been an actual investigation and determination of benefits.

In *Nichols* v. *Bridgeport* [1] a street extension was laid in part on plaintiff's land and he was assessed $600 for benefits besides losing his land, for as the benefits might be deducted from the damages, so where the benefits were found to exceed the damages the plaintiff might be assessed for the difference.[2]

However the opinion of *French* v. *Barber Asphalt Paving Co.* has been often reaffirmed, always with the same dissent. *Wight* v. *Davidson*[3] limits *Norwood* v. *Baker* to its peculiar facts and

[1] 23 Conn. 187.

[2] To the same effect is Hulton *v.* Milwaukee, 31 Wis. 27.

[3] 181 U. S. 371.

sustains an act of congress providing that one half the cost of a street opening should be levied upon the property found to be benefited and in proportion to the benefits, though the entire assessment might exceed the entire benefit, and the assessment against each parcel might be more than its increase in value. It may be remembered that in *Detroit* v. *Judge of Recorder's Court*[1] our Supreme Court held such proceeding void.

In *Tonawanda* v. *Lyon*[2], involving again the frontage rule of special assessment for street paving, under normal conditions, the rule was sustained, the court saying:—

"It was not the intention of this court, in that case, to hold that the general and special taxing systems of the states however long existing and sustained as valid, by their courts have been subverted by the 14th Amendment to the Constitution of the United States."[3]

However we may now be tormented with doubt concerning the general principle established by *Norwood* v. *Baker* it is made clear by these later cases that the validity of the front foot rule is not subverted by the 14th Amendment and that all or any part of the cost of a local improvement may be assessed under general laws without an opportunity to the taxpayers to show that the tax was in excess of the benefits. If this method is to be discarded it must be done by the legislatures or tribunals of the various states.

Yet it does seem that we may still believe that there is enough left of *Norwood* v. *Baker*, as well as from intimations in these subsequent cases, and also in *King* v. *Portland*,[4] that while these methods, that might be called arbitrary, are not only prima facie valid, but are generally conclusive, still, if the application of the rule would result in total confiscation of the property, the 14th Amendment might afford relief. Whether any thing less than entire confiscation would be relieved must, we believe, remain for future determination.

Nevertheless the case had a good effect as it has resulted in a reexamination of the fundamental principles of special assessment and some courts, which followed it while it was still in its primal vigor, appear to be well satisfied and disinclined to revert to or adopt the old doctrine that the determination of the legislature is conclusive.

FRANK L. SAGE

UNIVERSITY OF MICHIGAN

[1] 112 Mich. 588 [2] 181 U. S. 389.

[3] The same general effect are Webster *v.* Fargo 181 U.S. 394; Cass Farm *v.* Detroit, 181 U. S. 396; Detroit *v.* Parker, id. 399; Wormsley *v.* District of Columbia, id. 402; Schumite *v.* Heman, id; Farrell *v.* West Chicago Park Com'rs id. 404.

[4] 184 U. S. 61.